

*Order*

**BEFORE THE  
STATE OF WISCONSIN  
Division Of Hearings And Appeals**

In the Matter of Port Road Service's Stage 2

Case No. IH-97-01

Vapor Recovery Grant Awards for Facility #607

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

Port Road Service, c/o Mr. Greg Rausch, 11333 North Port Washington Road, Mequon, Wisconsin 53092, filed an application with the Department of Natural Resources for a Stage 2 Vapor Recovery Grant. The Department approved an award of \$14,533.00. On November 27, 1996, the Department received a request for a contested case hearing alleging the award was insufficient. By letter dated January 14, 1997, the Department granted the request for a contested case hearing. On January 27, 1997, the Department filed a request for hearing with the Division of Hearings and Appeals.

Pursuant to due notice hearing was held in Milwaukee, Wisconsin on March 11, 1997, before Mark J. Kaiser, Administrative Law Judge.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Port Road Services, Inc., by

Gregory J. Rausch, President  
14054 North Cedarburg Road  
Mequon, Wisconsin 53097

Wisconsin Department of Natural Resources, by

Thomas F. Steidl, Attorney  
P. O. Box 7921  
Madison, Wisconsin 53707-7921

**FINDINGS OF FACT**

1. Port Road Service filed an application dated December 1, 1994, with the Department of Natural Resources (Department) for a Stage 2 Vapor Recovery Grant for a vapor recovery system to be installed at Port Road Service, a gasoline service station located at 11333 North Port Washington Road, Mequon, Wisconsin.

2. The Department received the application on December 19, 1994. By letter dated April 17, 1995, the Department notified Mr. Rausch that it had approved an award of "up to \$26,962.00."

3. By letter dated October 24, 1996, the Department approved a final grant payment to Port Road Service of \$14,533. This amount is less than the amount preliminary approved because as part of the project Port Road Service had increased the storage capacity of its tanks from 10,000 gallons to 18,000 gallons.

4. Mr. Rausch presented credible testimony that increasing the size of the storage tanks from 10,000 gallons to 18,000 gallons did not affect the cost of the project.

#### APPLICABLE LAW

Sec. 285.31(5)(a)1., Stats., provides in relevant part:

(5) GRANTS. (a) The department shall develop, implement and administer a program to provide financial assistance to the owner or operator of a retail station. Only the following costs are eligible for reimbursement under the program:

1. Costs directly incurred after August 15, 1991, for the design, acquisition and installation of a vapor control system necessary for the owner or operator to comply with the requirements under sub. (3) on those portions of a retail station located in an ozone nonattainment area . . . that does not increase the stationary storage tank capacity of the retail station in existence on August 15, 1991.

Sec. NR 172.04(3), Wis. Adm. Code, provides in relevant part:

(3) ELIGIBLE SCOPE AND CAPACITY. If the stationary storage capacity of a project station is increased after August 15, 1991, the department shall prorate the grant amount based on the ratio of the storage capacity which existed on August 15, 1991 to the storage capacity after the increase.

#### DISCUSSION

Greg Rausch is challenging the proration of the Stage 2 Vapor Recovery Grant awarded by the Department. The Department reduced the award based on the fact that Mr. Rausch increased the size of the station's storage tanks as part of the project. Mr. Rausch argued that this proration was unfair because increasing the size of the storage tanks did not affect the cost of the project and reducing the amount of the grant will result in a financial hardship to his business.

Section NR 172.04(3), Wis. Adm. Code, requires the Department to prorate the amount of the grant proportionally to the increase in the size of the storage tanks. Section NR 172.04(3), Wis. Adm. Code, is the Department's interpretation of sec. 285.31(5), Stats. Arguably sec. 285.31(5), Stats., prohibits the awarding of any grant to a project which

involves increasing the size of the storage tanks. In promulgating sec. NR 172.04(3), Wis. Adm. Code, the Department has interpreted sec. 285.31(5), Stats., in the manner most favorable to grant applicants.

Mr. Rausch argues that increasing the size of the storage tanks did not affect the cost of the project; however, he does admit increasing the size of the storage tanks did result in some financial benefit to his business. Mr. Rausch testified that one of the reasons he increased the size of the storage tanks was because suppliers increased the size of the minimum delivery load service stations must accept without incurring an increased service charge. Thus by increasing the size of the stations storage tanks, Mr. Rausch will avoid the increased delivery service charge.

Also, the increased size of the storage tanks will result in fewer deliveries to his station. Mr. Rausch testified that the islands of his station are blocked during deliveries. Therefore, fewer deliveries will result in fewer interruptions of his business. Although it is unlikely that the benefits Port Road Service receives from increasing the size of its storage tanks will offset the reduction in the grant award, Port Road Service will realize a benefit from the larger storage tanks.

#### CONCLUSIONS OF LAW

1. Pursuant to sec. NR 172.04(3), Wis. Adm. Code, the amount of the Stage 2 Vapor Recovery Grant for Port Road Service must be prorated based on the ratio of the increase in storage capacity of Port Road Service as a result of the project.
2. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to grant awards for gasoline vapor recovery systems pursuant to secs. 285.31(5) and 227.43(1)(b), Stats.

#### ORDER

The calculation of the Stage 2 Vapor Recovery Grant for Port Road Service by the Department of Natural Resources is affirmed.

Dated at Madison, Wisconsin on April 4, 1997.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By Mark J. Kaiser  
MARK J. KAISER  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.